

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2010-000170

11/15/2011

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

CABLE ONE INC

PATRICK DERDENGER

v.

ARIZONA STATE DEPARTMENT OF
REVENUE, et al.

KENNETH J LOVE

AMY SPARROW
CHERIE R. KISER

UNDER ADVISEMENT RULING

The Court took this matter under advisement following oral argument on September 19, 2011. Upon further consideration of Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment, the Court finds as follows.

The Court does not believe that the federal government, in the exercise of its authority over interstate commerce, has acted to preempt state taxation of cable television or VoIP services. Therefore, appeals to federal law and regulations are not persuasive. Nor does it believe that classification of Cable One as a telecommunications company for tax purposes obligates the Corporation Commission to so regulate it; the two are governed by different statutes which need not compel identical results. Finally, the Court is not persuaded by the equal protection-related arguments against central valuation. The legislature may make distinctions between properties as long as those distinctions are based on "some ... real difference in [their] use, utility, or productivity"; identical or similar property put to different uses may be treated differently. *In re America West Airlines*, 179 Ariz. 528, 535 (1994). There is a real difference between VoIP-capable cable systems and non-VoIP-capable ones.

The sole, albeit challenging, issue appears to the Court to be whether the statutory language permits the Department's result. A telecommunications company, under A.R.S. § 42-

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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11/15/2011

14401, is “any person that owns communications transmission facilities and that provides public telephone or telecommunications exchange or inter-exchange access for compensation to effect two-way communication to, from, through or within this state.” If and only if Cable One does both of these, then it is subject to central valuation as a telecommunications company. That its VoIP service is only a small part of its overall business does not matter; the statute covers “any person that owns,” with no caveat that its ownership must make up some specific portion of its revenues or profits. Unfortunately, none of these terms is further defined; thus, the Court must rely on their ordinary meanings.

First, Cable One argues that it does not own a communications transmission facility. “Facility” does not necessarily mean “lines” in the traditional sense; *see, e.g.*, www.merriam-webster.com/dictionary/facility (defining facility as “something ... that is built, installed, or established to serve a particular purpose”); dictionary.reference.com/browse/facility (“something built, designed, installed, etc. to serve a specific function affording a convenience or service”). Indeed, cellular telephone service utilizes no physical medium at all to connect customers’ phones to their equipment, yet plainly provides a communications transmission facility. There is no reason why Cable One’s “cables” (to use a deliberately imprecise term covering the broad array of technology), when used for communications transmission, cannot constitute a “facility.”

The second requirement is more troubling. Perhaps because the legislature had not envisioned VoIP service when it drafted the statute, the language, “public telephone or telecommunications exchange or inter-exchange access,” is subject to alternate meanings. Does it mean, “{public telephone} or {telecommunications exchange or inter-exchange} access,” i.e., the business is covered if it provides public telephone access regardless of whether it connects the caller to the exchange, or does it mean, “{public telephone or telecommunications} {exchange or inter-exchange access},” i.e., it is covered only if it connects either the caller or the telecommunications user to the exchange? (As Cable One points out, “public telephone” is also an undefined term. However, it gives the Court less pause. Rather than being limited to common carriers, the definition it offered as “likely” in its motion, or to old-fashioned pay phones, the definition it suggested at oral argument, the Court believes the most natural meaning is simply telephone service offered to the public, irrespective of whether the offeror is a common carrier.) Cable One does not connect its VoIP users to an exchange, but it does provide telephone service between the subscriber’s home and the connection point with Level 3’s lines, distinguishing it from the directory assistance plaintiff in *Excell Agent Services, L.L.C. v. Arizona Dept. of Revenue*, 221 Ariz. 56 (App. 2008). The court in *Excell* came close to answering the question, albeit in dictum; after quoting the statutory language, it concluded, “Excell does not own transmission facilities and is not involved in providing exchange or interexchange access.” *Id.* at 58 ¶ 13. It was never suggested that *Excell* provided “public telephone,” so the omission of it may mean nothing. However, it is inescapable that the Court of Appeals, in distinguishing *Excell* from a telecommunications company, found the reasons to be that it did not own transmission

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 2010-000170

11/15/2011

facilities and did not provide exchange or interexchange access, indicating that these are the material factors determining whether a business is a telecommunications company under A.R.S. § 42-14401.

The Department's attempt to identify "exchange" (another term undefined by the statute) as "a geographic telecommunications service area," and "interexchange" by extension as an area outside the exchange, strikes the Court as reducing the terms to triviality. The essential purpose of telephone service is to connect the caller with a person or device in some other location. Under the Department's definitions, then, every provider of telephone service would *ipso facto* provide both exchange and interexchange access on every call; there would have been no need or purpose for the legislature to have included the terms. The less all-encompassing and therefore more natural meaning of "exchange or interexchange access" appears to the Court to refer to that point where, by whatever means, the connection is made between the caller's line and the recipient's. In this case, that point belongs to Level 3, not to Cable One.

Thus, there is no reason why the Department may not, given the appropriate facts, centrally value a VoIP provider as a telecommunications company. However, under the statutory definition of a telecommunications company, Cable One does not qualify.

Accordingly,

IT IS ORDERED granting Cable One, Inc.'s Motion for Summary Judgment.

IT IS FURTHER ORDERED denying Defendants' Cross-Motion for Summary Judgment.

IT IS FURTHER ORDERED Plaintiff shall lodge a form of judgment and file any Application and Affidavit for Attorney's Fees and Statement of Taxable Costs within thirty (30) days of the filing date of this minute entry.